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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No. 3:21-cv-03496-AMO

**DEFENDANT'S ADDENDUM
REGARDING PLAINTIFF'S MOTIONS
IN LIMINE NOS. 1 AND 5 AND
DEFENDANT'S MOTION IN LIMINE
NO. 4**

The Honorable Araceli Martínez-Olgún

1 Pursuant to the discussion at the November 25, 2024 Pretrial Conference and the Court's
2 Minute Entry, Dkt. 316, Intuitive hereby submits this addendum relating to its Opposition to
3 Plaintiff's Motion in Limine No. 1, Dkt. 301. The issues discussed herein also relate to Plaintiff's
4 Motion No. 5, Dkt. 303, and Defendant's Motion No. 4, Dkt. 295. Counsel for Intuitive shared
5 this addendum with counsel for SIS on November 26, 2024, prior to filing.

6 In order to prove an antitrust violation for the time period after November 2022, SIS must
7 show that Intuitive took actions that excluded it from the market during that time period. This is
8 a prerequisite to liability, not just damages. As noted at oral argument, Intuitive believes there is
9 compelling evidence that SIS was not excluded and made no efforts to compete during that time
10 period. This includes the evidence that Intuitive announced in 2023 it would approve for use with
11 the da Vinci any remanufactured devices that had FDA clearance. *See Betaseed, Inc. v. U & I*
12 *Inc.*, 681 F.2d 1203, 1224 (9th Cir. 1982); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722
13 (7th Cir. 1979); *see also* Defs' Trial Br., Dkt. 279-1, at 8 (discussing law concerning contract
14 provisions, like those at issue here, requiring approval for use of third-party products and services).

15 Even with respect to damages, SIS is required to show that its alleged lost profits are due
16 to anticompetitive conduct, not some other cause such as its own failure to compete. That requires
17 not just constructing a "but-for world," but also comparing it to the actual world to isolate the
18 effect of the defendant's alleged conduct. *See* Am. Bar Ass'n, *Proving Antitrust Damages: Legal*
19 *and Economic Issues* 89 (3d ed. 2017); *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1372
20 (9th Cir. 1992). Thus, evidence that Intuitive did not exclude SIS from competing as an approved
21 third party and that SIS made no efforts to compete in the actual world after November 2022 is
22 relevant to damages as well.

23 Accordingly, regarding its Motion in Limine No. 4, Intuitive should be able to introduce
24 such evidence at trial and SIS, having obtained judicial relief blocking nearly all discovery, should
25 be estopped from submitting evidence related to this time period. SIS's Motions in Limine Nos. 1
26 and 5 should be denied because FDA-related evidence is relevant without regard to whether FDA
27 clearance was required as a matter of law.

1 Dated: November 26, 2024

By: /s/ Kenneth A. Gallo
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CERTIFICATE OF SERVICE

On November 26, 2024, I caused a copy of Defendant's Addendum Regarding Plaintiff's Motions in Limine Nos. 1 and 5 and Defendant's Motion in Limine No. 4 to be electronically served via email on counsel of record for Surgical Instrument Service Company, Inc.

Dated: November 26, 2024

By: /s/ Kenneth A. Gallo
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